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No. 88-906

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

DOROTHY ZOSKY,
Petitioner
v.

DANIEL BOYER AND
BOENNING & SCATTERGOOD, INC.,
Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF FOR RESPONDENTS DANIEL BOYER AND BOENNING & SCATTERGOOD, INC.

Tom P. Monteverde
Jean C. Hemphill
Monteverde, Hemphill,
Maschmeyer & Obert
2230 The Fidelity Building
123 South Broad Street
Philadelphia, PA 19109-1022
(215) 735-1900

Attorneys For Respondents
Daniel B. Boyer, III and
Boenning & Scattergood, Inc.

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This Brief is filed on behalf of respondents Daniel Boyer and Boenning & Scattergood, Inc.[1]

COUNTERSTATEMENT OF QUESTION INVOLVED

Was the Court of Appeals correct in dismissing Petitioner's appeal of the district court's order staying a federal court securities fraud action and compelling industry arbitration of the claims pursuant to the agreement of the parties on the basis that it was an unappealable interlocutory order?

OPINIONS BELOW

A reproduction of the Third Circuit Court of Appeals opinion below is provided in the Appendix to Petition for Writ of Certiorari ("P-App."). The Court

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[1] Boenning & Scattergood, Inc. ("Boenning") is a privately owned Pennsylvania corporation.

of Appeals decision is now published at 856 F.2d 554 (3d Cir. 1988).

JURISDICTION

The Petition for Writ of Certiorari states that jurisdiction of this Court rests upon 28 U.S.C. Section 1241(1) and Rule 17 of this Court. There being no such section, respondents believe petitioner meant to state that jurisdiction of this Court rests upon 28 U.S.C. Section 1254(1).

COUNTERSTATEMENT OF THE CASE

Respondent Boenning and Scattergood, Inc. ("Boenning") is a regional securities brokerage firm and a member of the National Association of Securities Dealers ("NASD"). Daniel B. Boyer, III ("Boyer"), a registered securities representative employed by Boenning, was Petitioner's broker having followed him

to Boenning from his previous brokerage firm. At the commencement of her business relationship with Boenning, petitioner signed a Customer Agreement agreeing, inter alia, "to submit to arbitration any controversy between us arising out of your business or this agreement" (P-App. 71-72). Petitioner made several investments in her account at Boenning. One investment of twenty thousand dollars in a small start-up computer company was lost, however, when the company failed. Petitioner then sued the firm and her broker alleging misrepresentation and fraud based on respondents' sale of an allegedly unsuitable investment.

In their answer to the Complaint, respondents alleged as a defense the arbitration agreement and, at the same time, asked petitioner's counsel to

submit the claim to arbitration, which request was refused by petitioner. No motion to enforce the arbitration agreement was filed because such agreements were viewed as unenforceable by the Third Circuit Court of Appeals in investor securities fraud complaints at that time. See Opinion of the Court of Appeals (P-App. 26-27 and n.2).

Accordingly, the case proceeded to Federal Court arbitration and the arbitrators entered an award in favor of respondents on October 24, 1986, which was appealed, de novo, by petitioner. Shortly before the matter was to be tried, by consent, before the United States Magistrate, with direct right of appeal to the Court of Appeals, this Court filed its decision in Shearson/American Express, Inc. v. McMahon, ___ U.S. ___, 107 S.Ct. 2332, 96

L.Ed.2d 185 (1987), confirming the enforceability of customer/broker arbitration agreements even in cases alleging violations of the anti-fraud provisions of at least some of the federal securities laws. Immediately thereafter, respondents prepared and filed a Motion to Compel Arbitration, which petitioner opposed. On September 4, 1987, Magistrate Leomporra denied respondents' Motion to Compel Arbitration. The respondents filed a Notice of Appeal of the Order in the Third Circuit Court of Appeals.

Magistrate Leomporra requested further argument on the Motion to Compel Arbitration stating at the time that since an appeal had been filed he had no authority to alter his Order but he wished to hear further regarding the parties' legal positions in connection

with his preparation of an Opinion for review by the Court of Appeals. The Magistrate also requested further memoranda with respect to the issues raised in the Motion to Compel Arbitration. On October 13, 1987, Judge Leomporra issued a Memorandum Opinion in which he concluded that his decision denying the Motion to Compel Arbitration was erroneous. The Magistrate did not vacate the Order, however, acknowledging that he had no authority to do so because of the pending appeal, but he suggested that the respondents might withdraw their appeal so that the case would be returned to him for revision of the Order.

Based on that suggestion, respondents filed a Praecipe to withdraw the appeal on or about November 5, 1987 and the Clerk of the United States Court of Appeals of the Third Circuit dismissed

the appeal under the authority conferred upon the Clerk by Rule 42(b) of the Federal Rules of Appellate Procedure on November 17, 1987.

On November 25, 1987, respondents filed a Motion for Reconsideration of the Order denying their motion to compel arbitration and after receipt of an answer by petitioner, Magistrate Leomporra, on December 1, 1987, granted the Motion to Compel Arbitration and directed the appellant to proceed to arbitration before the NASD or the Philadelphia Stock Exchange. On December 17, 1987, petitioner filed a Notice of Appeal in the Court of Appeals of the Third Circuit of the Magistrate's December 1, 1987 decision.

On September 8, 1988, the Court of Appeals for the Third Circuit dismissed the appeal for lack of appellate

jurisdiction holding that a district court order compelling arbitration was interlocutory and, therefore, not immediately appealable. On September 30, 1988, the Court of Appeals denied the petitioner's Petition for Rehearing. On December 1, 1988, petitioner filed the subject Petition for Writ of Certiorari.

Reasons For Denying The Writ

Rule 17 of this Court provides:

> A review on Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor.

The Rule goes on to describe "the character of the reasons" the court will consider in passing upon a Petition for Writ of Certiorari, such as (1) conflicts and decisions between federal courts of appeals on the same issue; (2) wide departures by a federal court of appeals

from the "accepted and usual course of judicial proceedings"; and (3) a decision by a federal court of appeals on an important question of federal law which has not been, but should be, settled by this Court, or which has been decided in a way in conflict with applicable decisions of this Court.

When measured by the foregoing standards, the present Petition is clearly want of merit.

I. The Decision Of The Third Circuit Court Of Appeals In This Matter Properly Followed The Long-Standing Precedents Of Both This Court And The Third Circuit.

A. Background And Summary Of Argument

Prior to this Court's decision in Gulfstream Aerospace Corp. v. Mayacamas Corp., ____ U.S. ____, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988), the Third Circuit routinely accepted jurisdiction over

interlocutory appeals from orders granting or denying motions to compel arbitration under the Enelow-Ettelson[2] rule. Following that rule's abrogation in Gulfstream, the present case prompted the Third Circuit Court of Appeals to re-review the Court's jurisdiction over such orders under 28 U.S.C. Sections 1291 and 1292.

The Court of Appeals correctly concluded that neither Section 1291 nor Section 1292 provided a basis for interlocutory review of the Magistrate's Order. The Court's decision is solidly grounded in the established precedent of this Court in Catlin v. United States, 324 U.S. 229, 223, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945) and the Third Circuit in

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[2] Enelow v. New York Life Insurance Company, 293 U.S. 379 (1935); Ettelson v. Metropolitan Life Insurance Co., 317 U.S. 188 (1842).

Rogers v. Schering Corp., 262 F.2d 180 (3d Cir.), cert. denied, 359 U.S. 991, 79 S.Ct. 1121, 3 L.Ed.2d 980 (1959).

B. Petitioner's Complaint With The Decision Of The Court Of Appeals Does Not Challenge The Correctness Of The Law Applied But Rather The Factual Conclusions Of The Court Upon Application Of The Law.

In its decision in this case, the Court of Appeals for the Third Circuit followed the leading case in the Circuit, Rogers v. Schering Corp., 262 F.2d 180 (3d Cir.), cert. denied, 359 U.S. 991, 79 S.Ct. 1121, 3 L.Ed.2d 980 (1959). In Rogers, the Third Circuit Court of Appeals, en banc, established the following guidelines to determine when an order staying a proceeding pending arbitration or compelling arbitration is a final order under Section 1291:

> An order requiring arbitration is appealable as final under 28 U.S.C. Section 1291 'where it

> is not merely a step in the judicial enforcement of a claim nor auxiliary to the main proceeding but is the full relief sought' .... Such cases are to be distinguished from those in which an order for arbitration is made in the course of a continuing suit for other relief. (Citations omitted.) Id., 262 F.2d at 182.

In her Brief, Petitioner concedes that Rogers is the controlling case (Petitioner's Brief, pp. 10-11). Petitioner and the Court of Appeals part company, however, on the application of Rogers to this case. In that connection, the Third Circuit made the following factual analysis:

> This case, in which the defendant in a suit for statutory and common law damages has moved to compel arbitration, would appear to fall clearly within the rule of Rogers that orders arising out of a lawsuit, 'such as a suit for damages', are interlocutory and not appealable as final orders. Arbitration is not the full relief sought by the plaintiff; indeed, the

> plaintiff opposes arbitration. The magistrate retains jurisdiction and may be expected in the ordinary course of proceedings to issue the further orders necessary to effectuate the result of arbitration. When a final order is entered in this case, the issue of whether or not the magistrate properly ordered arbitration will be ripe for review. (P-App. 44-45)

Petitioner, on the other hand, argues:

> If the order compelling arbitration stands and the parties carry out an arbitration, the arbitration award will not require judicial approval or a court decree to put it into effect. The decision of the arbitrators will be binding. Therefore, unless petitioner now has a right to appeal from the order compelling arbitration, she will, in all probability, never be able to secure an appellate review of that order. (Petitioner's Brief, 10-11)

Petitioner's statements are incorrect. If the parties proceed to arbitration, petitioner would not lose

her right to a review of the propriety of the referral to arbitration at the conclusion of the suit--the lower court could review not only that issue, but any other issue which would be the appropriate subject of review by a court after an arbitration proceeding.[3]

Nor is petitioner irreparably harmed by the denial of the interlocutory appeal. The only prejudice to petitioner is the expense and delay arising out of an arbitration on the merits in the arbitration forum. The Third Circuit correctly noted that such expense and delay has never been a valid reason for an immediate appeal of an interlocutory order. New England Power Co. v. Asiatic Petroleum Corp., 426 F. 183 (1st Cir.

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[3] The Federal Arbitration Act, 9 U.S.C. Sections 10 and 11, outlines the power of the court, following the arbitration hearing, to vacate, modify or confirm an arbitration award.

1972); Stateside Machinery Co. v. Alperin, 526 F.2d 480 (3d Cir. 1975).

The Third Circuit's conclusion that the instant order was not a final order appealable under 28 U.S.C.S. Section 1291 is also consistent with decisions in most other circuits. Quinn v. CGR, 828 F.2d 1463 (10th Cir. 1987); Matter of Chicago, Milwaukee, St. Paul & Pacific R. Co., 784 F.2d 831 (7th Cir. 1986); Denley v. Shearson/American Express, Inc., 733 F.2d 39 (6th Cir. 1984); Wren v. Sletten Const. Co., 654 F.2d 529 (9th Cir. 1981); Limbach Co. v. Gevyn Construction Corp., 544 F.2d 1104, cert. denied, 430 U.S. 916 (1st Cir. 1976); Diematic Mfg. Corp. v. Packaging Industries, Inc., 516 F.2d 975 (2d Cir.), cert. denied, 423 U.S. 913 (1975).

C. This Court's Decision In Gulfstream Aerospace Corp. v. Mayacamas Corp. Did Not Alter The Prevailing Law In The Third Circuit With Respect To The Appealability Of Final Decisions Under Section 1291.

This Court, in Gulfstream Aerospace Corp. v. Mayacamas Corp., ____ U.S. ____, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988), reaffirmed the well established general rule which is the foundation of the Rogers decision, namely,[4]:

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[4] In the Gulfstream case, this Court further opined that the order there was also not reviewable under the "small class of exceptions" carved out of Section 1291 by the Court in Cohen v. Beneficial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949)(the "collateral order doctrine"). The Gulfstream decision repeated the three requirements of the Cohen collateral order exception to the finality rule:

> The order must conclusively determine the disputed question; resolve an important issue completely separate from the merits of the action; and be effectively unreviewable on appeal from a final judgment.

The Court found that the Gulfstream

> A district court's decision is appealable under Section 1291 only when the decision ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. Quoting Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945).

Thus, the Petitioner is correct when she states that Gulfstream did not alter the clearly established precedents under Section 1291. As stated above, however, the Court of Appeals did not find that Gulfstream changed Section 1291 and it did not depart from the established precedents under that Section.

Order did not "conclusively determine the disputed question" and thus failed the first prong of the collateral order exception test. Here, the Court of Appeals found no basis for applying the collateral order rule (P-App. 54-55) and Petitioner has not challenged that finding.

D. The Gulfstream Decision Only Affects The Law Under Section 1292(a)(1) And The Third Circuit Did Not Base Its Decision Here On Section 1292(a)(1).

In the second portion of its Opinion in Gulfstream, this Court found that the district court order was not appealable under Section 1292(a)(1). In doing so, this Court expressly overruled its earlier decisions in Enelow v. New York Life Insurance Company, 293 U.S. 379 (1935) and Ettelson v. Metropolitan Life Insurance Co., 317 U.S. 188 (1942) (the so called "Enelow-Ettelson rule") and held that orders granting or denying stays of "legal" proceedings on "equitable" grounds were not automatically appealable under 28 U.S.C. 1292(a)(1).

In the present case, the Third Circuit Court of Appeals noted that:

> At the time the briefs were filed in this court, the Enelow-Ettelson doctrine, under which certain orders staying or refusing to stay judicial proceedings were treated as appealable injunctions, was an accepted feature of the law of appellate jurisdiction. (Citations omitted.) (P-App. at 29-30)

After further analysis, the Court of Appeals concluded:

> In the wake of Gulfstream's abrogation of the Enelow-Ettelson doctrine, it will once again be imperative to analyze appealability of orders effecting arbitration under the various sources of appellate jurisdiction. (P-App. at 37-38)

In the analysis that followed, the Third Circuit distinguished its earlier decision in Gavlick Construction Co. v. H. F. Campbell Co., 526 F.2d 777 (3d Cir. 1975), to the extent that it is inconsistent with the Rogers decision, with the following note:

> 5. We note however that because the stay portion of

> Gavlick was appealable under Enelow-Ettelson, the distinction made between the stay and the order compelling arbitration was unnecessary. For example, in Formigli Corp. v. Alcar Builders, Inc., 329 F.2d 79, 80 (3d Cir. 1964), this court, faced with the same situation, treated an order both compelling arbitration and staying proceedings as an interlocutory stay order. The entire order in Gavlick was interlocutory in nature and was entirely appealable at the time under the then prevailing precedent. We could thus regard Gavlick's Section 1291 rationale as dictum had it not spawned a following of its own. (P-App. 47)

Thus, the only consideration given to the Gulfstream decision by the Third Circuit Court of Appeals in this case was its effect on the Enelow-Ettelson doctrine. The remainder of the analysis by the Third Circuit related entirely to its own precedent in Rogers and other authorities. Accordingly, petitioner's discussions regarding the distinctions

between this case and the Gulfstream case are misplaced and unnecessary.

E. The Third Circuit Court Of Appeals Decision Is Consistent With Established Policy Of This Court.

As noted by the Court of Appeals, the result reached in this case is consistent with the policy considerations articulated by this Court relating to limiting the appealability of interlocutory orders. The Court of Appeals reasoned:

> Although we are not makers of policy, we cannot avoid consideration of the practical effect of our decision that orders staying proceedings or compelling the parties in an ongoing lawsuit to arbitrate are nonappealable interlocutory orders. Arbitration is an expeditious and inexpensive mode of alternative dispute resolution. Allowing interlocutory appeals of such orders would defeat the attractiveness of arbitration by imposing delay and additional expense. Immediate appealability would thus

> detract from the broad federal policy in favor of arbitration, emphasized repeatedly by the Supreme Court.
>
> Our holding is also consistent with the Supreme Court's limitation of appealability of interlocutory orders in other contexts. As the Court has stated, permitting wholesale appeals of orders entered in the course of proceedings 'would constitute an unjustified waste of scarce judicial resources' *** We are thus satisifed that our holding is supported by important policy concerns about the allocation of judicial business between district courts and the court of appeals. (Citations omitted.) (P-App. 56-57)

CONCLUSION

The Court of Appeals decision in this case is consistent with the precedents of this Court and the Courts of Appeals and in no way departs from the accepted and usual course of judicial proceedings.

The Court of Appeals decision in no way conflicts with the applicable

decisions of this Court and does not involve an unresolved question of federal law which requires the review of this Honorable Court. Accordingly, respondents respectfully request the Court to deny Petitioner's Writ of Certiorari.

TOM P. MONTEVERDE
JEAN C. HEMPHILL
Attorneys For Respondents,
Daniel Boyer and Boenning
& Scattergood, Inc.

OF COUNSEL:

MONTEVERDE, HEMPHILL, MASCHMEYER & OBERT
Suite 2230, The Fidelity Building
123 South Broad Street
Philadelphia, PA 19109-1022
(215) 735-1900